

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANTHONY BRODSKI,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

3:11-CV-0206-LRH (VPC)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

August 22, 2011

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B). Before this court are plaintiff's applications to proceed *in forma pauperis* (#s 1 & 5). As set forth below, it is recommended that plaintiff's applications to proceed *in forma pauperis* be denied and his complaint be dismissed without prejudice.

Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915, which provides that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all allegations of material fact stated in the complaint, and the

1 court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74
2 F.3d 955, 957 (9th Cir. 1996).

3 The complaint must be dismissed *sua sponte* if it is in fact frivolous – that is, if the claims
4 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that
5 are untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement
6 of a legal interest which clearly does not exist), as well as claims based upon fanciful factual
7 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
8 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

9 In the instant case, plaintiff's complaint lacks an arguable basis in either law or fact. Plaintiff
10 brings this action against the State of Nevada. Plaintiff alleges that at some point in time, a Marshal
11 in "Tetco, North Richmond Hills, Texas" may have called plaintiff on his cell phone and harassed
12 plaintiff for back taxes and/or called plaintiff an "undocumented pedophile." Plaintiff seeks
13 damages for "false imprisonment of the mind," emotional infliction of stress, assault and battery,
14 defamation, and slander. Additionally, plaintiff seeks an injunction to have all "hostility stopped
15 electronically and personally" against him.

16 Without addressing the potential jurisdictional problems that plaintiff would have
17 encountered, this court concludes that plaintiff's legal theories are indisputably meritless. None of
18 plaintiff's allegations or requests for relief has an arguable basis in law or fact. Accordingly, the
19 court concludes that plaintiff's complaint is frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). Therefore,
20 it is recommended that plaintiff's complaint be dismissed with prejudice.

21 The parties are advised:

22 1. Pursuant to 28 U.S.C § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, the
23 parties may file specific written objections to this report and recommendation within fourteen days
24 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
25 Recommendation" and should be accompanied by points and authorities for consideration by the
26 District Court.

27 2. This report and recommendation is not an appealable order and any notice of appeal
28 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IT IS THEREFORE RECOMMENDED that the district court enter an order **DENYING** plaintiff's motions to proceed *in forma pauperis* (#s 1 & 5) and **DISMISSING** this action with prejudice as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

Valerie P. Cooke

- 3 -